IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,

Appellants,

—v.—

STATE BAR OF ARIZONA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE APPELLANTS

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OPINION BELOW

The opinion of the Supreme Court of Arizona is not yet reported. It appears as Appendix A to the jurisdictional statement (pp. 1a -18a).

JURISDICTION

The order of the Supreme Court of Arizona was entered on July 26, 1976. Notice of appeal was filed on July 28, 1976. The jurisdictional statement was filed on September 1, 1976. Probable jurisdiction was noted on October 4, 1976. The jurisdiction of this Court is based upon 28 U.S.C. 1257(2).

QUESTIONS PRESENTED

1. Does a total ban upon advertising by private attorneys, enforced by an integrated state bar and state supreme court, violate the First Amendment?

2. Does such a ban, originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court, violate the Sherman Act notwithstanding the state-action exemption doctrine of Parker v. Brown, 317 U.S. 341 (1943)?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Disciplinary Rule 2-101(B), of which the validity is in question here, is embodied in Rule 29(a) of the Supreme Court of Arizona, Ariz. Rev. Stat. Vol. 17A, Supp. p. 23. It provides as follows:

DR 2-101

. . .

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises and other legal publications, and in dignified advertisements thereof.

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102(A)(6), directed to a member or beneficiary of such organization.

The First Amendment and pertinent provisions of the Sherman Act and of the Rules of the Arizona Supreme Court are reproduced in the appendix to this brief. (App. pp. 1a-6a infra).

STATEMENT

A. FACTS

Appellants' practice

Appellants John R. Bates and Van O'Steen are attorneys licensed to practice in the State of Arizona. Both are 1972 graduates of Arizona State University College of Law. Mr. Bates was selected by the faculty of that institution as the outstanding student of his class; Mr. O'Steen was graduated cum laude. (A. 220-21).[1] After admission to the Bar in September 1972, they both practiced as attorneys with the Maricopa County (Arizona) Legal Aid Society for a year and a half. (A. 221).

In March 1974, appellants left the Legal Aid Society and established a private practice in Phoenix under

[1] References to the single printed Appendix are denoted "A. ". References to the appendix of this brief and of the jurisdictional statement are denoted, respectively, "App. p. , infra" and "Juris. St. App. p. ". References to the transcript of hearing in the original record are denoted "Tr. ".

the name of the Legal Clinic of Bates and O'Steen. (Tr. 154). The practice is a highly unusual one; it was established as a conscious effort to provide legal services of good quality to persons of low and moderate income who did not qualify for governmental legal aid and who consequently had difficulty finding lawyers at prices they could afford. (A. 75). This portion of the public is now the group least served by the legal profession. (Exh. 3; A. 22, 289, 305-06). Typically, appellants' clients have ranged from those on welfare to a very few with a family income over $25,000. (A. 81-82). In nearly 50 instances, appellants have served needy clients without fee. (A. 222). The rest they have served at modest fees suitable for persons of moderate or limited income.

To enable such service, appellants have imparted certain characteristics of a legal clinic to their firm which cumulatively distinguish it from the usual private law firm. Each attorney within the firm specializes, and maximum use is made of paralegals so that the

attorneys' expertise is brought to bear in the most efficient way. (A. 76). Paralegal personnel are not, of course, allowed to give legal advice or represent clients in court, but they are used for many tasks which attorneys perform in other offices but which really do not call for a lawyer's expertise. (A. 76).

Appellants have also used a "systems approach" to their practice, in which many repetitive tasks are put together by attorneys into systems which can then be operated by paralegals. Clerical work is reduced by the use of forms, many of which are of appellants' own design, and by use of automatic typewriting equipment. (A. 78-79, 115). While such a systems approach and use of paralegals may be common in large firms engaged in commercially-oriented practice, they are quite unusual in firms serving the moderate-income clientele of the appellants. (A. 79-81). In addition, appellants do not maintain a substantial collection of law books; they use institutional libraries for research. (A. 79).

Appellants' practice is specialized not only between the lawyers in the firm, but also in the cases the firm as a whole accepts. While not all of the categories of cases accepted by appellants fit a pattern, the emphasis is very clearly upon matters of a routine nature that suits them particularly well to a cost-saving systems approach. The types of cases which appellants accept are uncontested divorce and other domestic relations matters; adoptions; guardianship and conservatorship; individual bankruptcies; wills; probates; changes of name; personal injury matters; and some consumer contract and real estate work. (A. 71-72). Appellants would not, for instance, accept a complicated medical malpractice case, and they do not accept contested divorces. (A. 114, 97). Potential divorce clients who have not reached agreement with their spouses on the terms of the divorce are referred to the Maricopa County Lawyer Referral Service. (A. 97). Appellants do not do criminal work. (A. 72). Appellants' final and most important cost-saving device from the standpoint of the client

is that they make a relatively low profit on each case they handle. (A. 79,83). The total approach of appellants' practice consequently depends for its economic viability on substantial volume. (A. 122-23).

The advertisement

After conducting their practice in this manner for two years, appellants concluded that their practice and the clinical concept in general could not survive unless the availability of legal services at low cost was generally advertised. They also concluded that this could not be done without the advertisement of fees. (A. 120-23). Consequently, on February 22, 1976, appellants caused an advertisement to be published in the Arizona Republic, a major daily newspaper for the Phoenix metropolitan area. The advertisement stated the availability of appellants' services at reasonable fees, and set forth fees for certain services, such as $175.00 plus $20.00 filing fee for an uncontested divorce. (Exh. 6; A. 24, 409).

Appellants' immediate motive in placing the advertisement was, of course, to increase the volume of their practice and make it economically viable. But they were also motivated by a desire to help create a better system of delivery of legal services to persons in need of them who might not otherwise obtain them. (A. 123). During the period from the publication of the advertisement to the day before the initial hearing in this proceeding, appellants opened files for 74 new clients. In the comparable period just prior to the advertisement, they opened 37. (A. 235-36). Forty of the new clients accepted after the advertisement filled out a form indicating why they had come to appellants; 24 of those indicated that it was because of the advertisement or the newspaper. (A. 225-27; Exh. 17, A. 230, 586). Because of contemporaneous news stories prominently featuring the fact that appellants had advertised, it is not possible to determine with exactitude whether those 24 clients were attracted by the advertisement, the news stories, or both. (A. 228-29).

Economic effects of price advertising

One of the rare facts upon which virtually all economists agree is that price advertising is pro-competitive and has the effect of decreasing prices. (A. 187-88). The advertisement placed by the appellants is a classic example of such price advertising. (A. 192); Exh. 6, A. 24, 409). By making more information available to the consumer, price advertising contributes to a system of workable competition which enables the consumer to obtain goods or services at the lowest price consistent with the continued operation of the provider. (A. 173-76). There is nothing to indicate that increased competition leads to a decrease in quality of goods or services; experience points instead to an improvement in quality. (A. 194-96; 210-11).

Conversely, a ban upon advertising tends to increase prices without improving quality. This tendency is confirmed by studies on the retailing of prescription drugs and eyeglasses -- the only subjects permitting comparison between states allowing free advertising and

others prohibiting it in various degrees (A. 177, 182-83; Exhs. 13, 14). For example, after correction for all other distinguishing factors, drug prices remained 5% higher in states with advertising bans than in those without. (A. 178; Exh. 13). For eyeglasses, the difference was $5 to $6 on a pair of glasses costing from $30 to $40, and, at the extreme, eyeglasses in the state having the most severe prohibition of advertising sold for $19 per pair more than in the state having the least restrictions upon advertising. (A. 183-84; Exh. 14). The lower prices prevailing in states with advertising were attended with just as high levels of service and quality as those which existed in the higher price, non-advertising states. (A. 180-82; 184-86).

A comparable study cannot yet be done in relation to legal services because of the uniformity of the ban on general public advertising by lawyers (A. 188-90). Nevertheless, expert opinion supports the view that price advertising in the legal profession would

similarly increase competition with the effect of lowering prices while maintaining or improving quality. (A. 192-94; 210-11). Newspaper advertising will have a greater competitive effect than the mere furnishing of fee information upon request at the lawyer's office, because placing the burden of seeking information on the consumer increases the cost of obtaining that information and makes more difficult the comparison of lawyers' fees. (A. 217-18).

The prohibition against advertising

Like Canon of Ethics 27 which preceded it, the present prohibition against advertising, Disciplinary Rule 2-101(B), was originally adopted by the American Bar Association, in which the State Bar of Arizona is represented. (Exh. 5, A. 23, 353-54). DR 2-101(B) was subsequently adopted by the Supreme Court of Arizona with minor modifications of grammar and cross-references.[2] (Exh.

[2]The ABA version of DR 2-101(B) permits certain institutional advertising by legal services organizations specified

5, A. 23, 352-53). It applies to all members of the State Bar of Arizona, an integrated bar. All members are also generally subject, by court rule, to the "duties and obligations ... prescribed by the Code of Professional Responsibility of the American Bar Association, as amended by [the Arizona Supreme] Court." Ariz. Sup. Ct. Rule 29(a).[3]

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in DR 2-103(D)(1)-(5). The Arizona Supreme Court version omits that cross-reference and permits institutional advertising by "qualified legal assistance organization[s]." Supra, p. 3.

[3]The 1975 amendments to the Code of Professional Responsibility by the American Bar Association relaxed the rules against advertising by individual attorneys only to the extent of permitting limited advertising (including advertisement of an initial consultation fee only) in classified sections of telephone directories or directories published by bar associations. 62 A.B.A.J 309 (1975). The amendment is not in effect in Arizona or most other states, and would not in any event permit advertisement of fees for specific services or advertisement in mass media such as that engaged in by appellants. It should also be noted that price advertising is not permitted by the publishers of the classified "yellow

A ban on general public advertising has not only been adopted by lawyers' professional associations (Exh. 5, A. 23, 352; Exh. 3, A. 22, 284-85), it has also been a matter of agreement among several other professions, whether or not the ban is enforced with the aid of a state agency. Associations of medical doctors, certified public accountants, and architects include in their ethical codes prohibitions of general public advertising by individual practitioners. (Exh. 4, A.23, 311; A. 35-36; Exh. 7, A. 25, 410; A. 150). Some of the professions employ even more direct means of restricting price competition. The Maricopa County Bar Association maintained and circulated a schedule of suggested minimum fees until two or three years ago. (Exh. 5, A. 23, 355). The American Institute of Certified Public Accounts had a rule against competitive bidding until the Justice Department made them eliminate it (A. 59), and a similar rule

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pages" section of most telephone directories. Current Developments in Professional Resonsibility 1-1 (Mar. 1976).

was enforced by the Arizona State Board of Accountancy until the Attorney General of Arizona issued an opinion that it violated the federal and state anti-trust laws. (A. 56-57; Exh. 11, A. 56, 449). Architects, whose ethics are enforced by their private association, are permitted to solicit clients in person but their ethics prohibit competing with other architects on the basis of price. (A. 161).

Various justifications are put forth in the record for prohibitions against professional advertising. Some are primarily internal to the professions, such as the contention that advertising would impair the dignity of a profession (Exh. 3, A. 22, 287-88; A. 44), or would favor firms with greater financial resources (Exh. 3, A. 22, 293-94). Other justifications directly concern the public, such as the argument that advertising is likely to be misleading. (Exh. 5, A. 23, 376-78; Exh. 3, A. 22, 291-92; A. 152). However, there is not anywhere in the record any indication tht appellants' advertisement has misled anyone, or that their services were not

performed competently for the fees advertised. A further justification offered for prohibiting price advertising is that if a fixed fee is advertised, unexpected complications in some cases such as uncontested divorces will cause the attorney to depart from his pre-set fee or alternatively to refrain from performing work which competent disposition of the case requires. (Exh. 5, A. 23, 376-80). Yet many attorneys quote fixed fees for uncontested divorces over the telephone (Exh. 5, A. 23, 405; A. 238-40), and the prepaid legal services plan sponsored by the State Bar itself sets forth a schedule of fees for certain services to which the participating attorney agrees to limit himself. That plan, for instance, sets $250 for an uncontested dissolution of marriage, $225 for an individual nonbusiness bankruptcy, and $300 for husband-wife joint nonbusiness bankruptcy. (Exh. 12, A. 168, 471-73). The theory of such a fixed-fee plan is that if cases occasionally turn out to involve more work than anticipated, the majority will not, and the set fee will average out properly when spread

over all the cases. (Exh. 5, A. 23, 407-08). The same principle applies to contingent fees. (Exh. 3, A. 22, 303-04). But testifying attorneys agree that the true professional does competent work whether he is getting paid for his efforts on a particular case or not. (Exh. 5, A. 23, 404-05; Exh. 3, 22, 304).

Interstate commerce

The members of the State Bar of Arizona as a group substantially affect interstate commerce in their own practices and in services to clients whose activities affect interstate commerce. (Exh. 5, Record, pp. 10-11). Appellants in their practice have concluded 73 cases which involved interstate elements such as parties or creditors in other states or negotiation with out-of-state insurers. (Tr. 154-158; Exh. 16). Their practice also uses substantial amounts of supplies and services furnished in interstate commerce. (Tr. 158-161). At least 2000 copies of the advertisement which is the subject of this proceeding

were distributed in other states as part of the regular circulation of the Arizona Republic. (Stip., A. 587).

The proceedings below

As a result of their advertisement, appellants were charged by the State Bar of Arizona on March 2, 1976 with violation of DR 2-101(B). The matter was heard by a Special Local Administrative Committee of the State Bar on April 7, 1976. The Committee took the position that it was empowered only to determine whether the Rule had been violated and to recommend a penalty, but it permitted a full record to be made as a foundation for an attack on the validity of the Rule before higher tribunals. On April 8, 1976, the Committee found that appellants had violated the Rule and recommended that each of them be suspended from the practice of law for not less than six months. (A. 588)

The matter was reviewed by the Board of Governors of the State Bar on April 28, 1976. On April 30, 1976, the Board adopted the findings of the Committee but recommended that each of the appellants be suspended for one week

only, the suspension to be served consecutively. (A. 592-94).

The matter was then submitted to the Supreme Court of Arizona upon briefs and upon the record made before the Administrative Committee and the Board of Governors. On July 26, 1976, that Court ruled that appellants had violated DR 2-101(B). The Court rejected appellants' contentions that DR 2-101(B) was invalid under the First Amendment as construed by this Court in Bigelow v. Virginia, 421 U.S. 809 (1975) and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96. S. Ct. 1817 (1976). It further rejected appellants' argument that DR 2-101(B) violated Sections 1 and 2 of the Sherman Act, holding that the Rule was immunized from the reach of the Sherman Act by the state action exemption set forth in Parker v. Brown, 317 U.S. 341 (1973).[4] The Court also suggested that it was

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[4]The Arizona Supreme Court did not cite this Court's decision in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976), but the Cantor decision had been furnished to that Court as soon as it was

not subject to the interference of the legislative branch, "state or federal", in its regulation of the practice of law.

Justice Holohan dissented, stating that the ban on advertising violated the First Amendment, including the right of the public to know, and that it should not be adhered to in the face of contrary national antitrust policies. He also contended that prohibiting newspaper advertisement while permitting advertisement in sanctioned law lists violated equal protection.

The penalty imposed upon appellants by the Supreme Court of Arizona was that of censure, which was ordered in its opinion. The censure was stayed by Mr. Justice Rehnquist on August 5, 1976, pending final determination of the matter by this Court.

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available two weeks before the decision below. The arguments in this brief now supported by Cantor were briefed and submitted to the Court below prior to the decision in Cantor, and the pendency of Cantor was noted in appellants' brief.

SUMMARY OF ARGUMENT

Appellants' advertisement was an essential element in their system of delivery of legal services at low cost to a portion of the public now largely unserved by the legal profession -- those of moderate means. Prohibition of the advertisement violates both the First Amendment and the federal antitrust laws.

I. Disciplinary Rule 2-101(B) Violates the First Amendment on its Face and as Applied to Appellants.

Disciplinary Rule 2-101(B) severely restricts commercial speech, which is now firmly established as a subject of First Amendment protection. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976). DR 2-101(B) is accordingly invalid unless the state shows it to be necessary to serve an extremely important state interest which outweighs the public interest in speech, and which

could not be served by a more narrowly drawn regulation. The state has made no such showing here.

The First Amendment interests favoring appellants' advertising are overwhelming. Commercial speech is protected because of its importance to individual economic decision-making, upon which depends the proper allocation of resources in a free market economy. Virginia State Board of Pharmacy, 96 S. Ct. at 1827. In stating fees for specific services, appellants' advertisement provided the type of economic information most useful for consumer decision-making, information "as to who is producing and selling what product...and at what price". Id. The public need for such information is immense; tens of millions of Americans do not know how to find a lawyer and are afraid they cannot afford one. Disciplinary Rule 2-101(B) discriminates against the dissemination of information addressed to this group, which lacks the knowledge of lawyers easily available to commercial clients, and in so doing violates the First Amendment. Cf. Police Dept. of Chicago

v. Mosley, 408 U.S. 92 (1972).

Appellants' right to advertise is also buttressed by the independent constitutional right of their potential clients to obtain legal services, NAACP v. Button, 371 U.S. 415 (1963), as well as their First Amendment right to receive information.

No important state interest supports the prohibition of Disciplinary Rule 2-101(B). A desire to avoid barratry is simply insufficient reason to keep millions of people ignorant of the cost and availability of legal services; the organized bar recognizes as much in its program of institutional advertising.

Nor is there any support for the suggestion that attorneys who advertise fixed fees will reduce quality when a case turns out to be unexpectedly complicated. The argument is wholly undercut by the State Bar's own prepaid legal services program, in which attorneys agree in advance to fixed fees.

Problems of deceptive advertising, like those of quality, can be dealt with by direct means more narrow than a total prohibition of advertising. There

is no showing that all attorney advertising is inherently misleading, or that appellants' advertising was. Appellants performed their services competently and adhered to the advertised fees. The Rule is fatally overbroad.

All of the justifications offered by the State share the characteristic condemned in Virginia State Board of Pharmacy, 96 S. Ct. at 1829: they purport to protect the public by keeping it in ignorance. They consequently do not support Disciplinary Rule 2-101(B) against a First Amendment challenge.

II. Enforcement of Disciplinary Rule 2-101(B) Against Appellants Violates the Sherman Act.

The Sherman Act's prohibition of restraints of trade extends to the legal profession, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and an agreement not to advertise prices is a per se violation of the Act. United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688 (7th Cir. 1961). Disciplinary Rule 2-101(B) constitutes such

an agreement, and the Supreme Court of Arizona erred in holding that it was exempt from the antitrust laws under the state action doctrine of Parker v. Brown, 317 U.S. 431 (1943).

This Court recently defined the limits of the Parker "exemption" in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976). There it was held that a regulated power company's practice of supplying free light bulbs violated the Sherman Act even though the policy had been approved by a state agency and the company was not free under state law to deviate from it. In rejecting the company's Parker defense, this Court ruled: (1) that a privately initiated restraint is not withdrawn from the Sherman Act by its embodiment in a state command; and (2) that pervasive state regulation of an industry did not give rise to an antitrust exemption unless the exemption was necessary to make the regulatory scheme work. It also indicated (3) that even in cases of direct conflict, the federal interest need not inevitably be subordinated to that of the state. All three elements

are applicable to the present case, and require reversal of the decision below.

1. Disciplinary Rule 2-101(B) originated with the American Bar Association with the participation of the State Bar of Arizona, an integrated bar association similar to the one held subject to the antitrust laws in Goldfarb, supra. It was subsequently adopted by the Arizona Supreme Court. Since the bar association exercised a high degree of individual choice in privately initiating the ban upon advertising, the prohibition violates the Sherman Act despite its adoption into a state regulation of binding effect. Cantor, 96 S. Ct. at 3118-19. That being the case, the state may not now enforce its command to violate the antitrust laws. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 389 (1951).

2. The ban upon advertising is clearly not necessary to make Arizona's general regulation of the practice of law work. Advertising will not affect state control of the admission of attorneys to

practice or the enforcement of the great majority of disciplinary rules governing their conduct. Protection of the public from deception can be achieved by means other than a prohibition of all attorney advertising.

3. In any event, the federal interest in encouraging competition greatly outweighs the state interest in suppressing advertising. Attorney advertising of the cost and availability of legal services will increase the volume of practice to permit economies of scale, keep fees reasonably low, and will stimulate innovation in the delivery of legal services. The countervailing interests of the state are insufficient to overcome the federal policy of competition for the same reasons that they fail to justify an intrusion upon First Amendment interests. A state action exemption is particularly unjustified in the present case because it would largely eliminate price competition without substituting any system of fee regulation to counteract excesses likely to attend monopoly power. State interests accordingly do not justify the subordination of

federal policy, and Disciplinary Rule 2-101(B) is invalid because it conflicts with the Sherman Act. No principle of separation of powers or federalism protects the Rule from such invalidation.

ARGUMENT

I. DISCIPLINARY RULE 2-101(B) VIOLATES THE FIRST AMENDMENT ON ITS FACE AND AS APPLIED TO APPELLANTS

A. Appellants' advertisement is protected expression.

Although it raised fundamental issues concerning the delivery of legal services to the public, appellants' advertisement in the Arizona Republic was on its surface simple commercial expression; it offered specified services at stated fees. Whatever may have been the status of commercial speech in the past, it is now established beyond argument that it enjoys First Amendment protection. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976). This protection applies under the Fourteenth Amendment against action by

the states. Schneider v. State, 308 U.S. 147, 160 (1939). Traditionally, the state bears a very heavy burden of justification when it impinges upon a First Amendment interest. NAACP v. Button, 371 U.S. 415, 438-39 (1963); Dunn v. Blumstein, 405 U.S. 331, 342-43 (1972). At the very least, it is necessary in cases of commercial speech to "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." Bigelow v. Virginia, supra at 826. The balance in the present case is overwhelmingly in favor of appellants' expression.

1. Appellants' advertisement of fees for certain services is precisely the type of advertising most affected with a First Amendment interest.

In Virginia State Board of Pharmacy, supra, this Court held that a statute prohibiting the advertisement of prescription drug prices violated the consumers' First Amendment right to receive economic information. Arguments of the Board of Pharmacy that the

admittedly important professional responsibilities of pharmacists necessitated the prohibition were rejected, for "[t]he advertising ban does not directly affect professional standards one way or the other." 96 S. Ct. at 1829. The Court necessarily refrained from deciding to what degree First Amendment protection of commercial speech extended to attorney advertising, 96 S. Ct. at 1831, n. 25. But the rationale of the decision and the important public policies underlying it clearly establish that appellants' advertisement contains exactly the kind of commercial message most entitled to the benefits of the First Amendment.

The First Amendment interest in commercial speech stems from the central role of economic information in the allocation of resources in a free market economy. Virginia State Board of Pharmacy, 96 S. Ct. at 1827; see Redish, Commercial Speech and Free Expression, 39 Geo. Wash. L. Rev. 429, 432-48 (1971). It is crucial to this role, and highly important to the individual consumer in his decision-making, that there be

dissemination of information "as to who is producing and selling what product, for what reason, and at what price." Virginia State Board of Pharmacy, 96 S. Ct. at 1827. Appellants' advertisement contained precisely this type of concrete economic information; it informed the potential client what legal services would be rendered by what attorneys and for what fee. The fee information in particular contributes to the proper functioning of a competitive market. (A. 187-88).

The public need for information regarding attorneys' services and fees is immense. A final report of survey by the American Bar Association Special Committee to Survey Legal Needs, to be published in December 1976, documents the fact that tens of millions of Americans of moderate means who have legal problems and know it do not seek legal counsel, because they do not know how to find a lawyer and they are afraid that they cannot afford one. Am. Bar News, Mar. 1976, p. 8. See B. Curran & F. Spalding, The Legal Needs of the Public 85-86 (Am. Bar Found. Prelim.

Rept. 1974).

Fee advertising is of great interest to the individual consumer, particularly retired persons on fixed incomes. (A. 134, 139). It is common knowledge that legal fees vary widely; it is not common knowledge what those variations are or who charges which fees. Appellants' advertised fee for an uncontested divorce is $175; the fee authorized for that service by a lawyer enrolled in the State Bar's prepaid services plan is $250. (Exh. 12; A. 168, 473). Appellants' advertised fee for preparing all of the papers and instructing persons how to obtain their own uncontested divorces --a service not likely to be known by the public to be available -- is $100. Appellants fee for uncontested nonbusiness joint bankruptcy is $300. Federal court records for such bankruptcies filed in Phoenix during June 1976 indicate fees ranging from $300 to $600.[5] E.g., In re Renfro, B-1038, 1039 (D. Ariz. 1976);

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[5]The possibility exists that some variation in fees is due to the performance of additional services. If so, that fact is also of importance to the consumer and can be advertised.

In re Cabrera, B-76-1044, 1045 (D. Ariz. 1976). Fee information is consequently very significant to the consumer; in many cases, particularly those involving relatively standardized services, the fee is the single most important factor. In publishing their fees, appellants directly serve the purposes of the First Amendment and are entitled to its protection.

2. The discriminatory effect of the Disciplinary Rules regarding advertising amounts to content regulation in violation of the First Amendment.

Disciplinary Rule 2-101(B) operates with a discriminatory impact upon that great majority of the public that has little contact with lawyers. A ban upon public advertising may have caused little damage to the average person in the small-town conditions that prevailed in most of the country into this century; people in each community knew their local lawyers and knew something about them. They may well have known generally what those lawyers charged for their services. But in the modern urban setting,

the only group which typically knows of its need for legal services, knows attorneys who can satisfy those needs, and knows something of their competence and their fees, is the community of substantial commercial clients who provide the bulk of practice of the typical urban large law firms. B. Christensen, Lawyers for People of Moderate Means 130 (Am. Bar Found. 1970); J. Auerbach, Unequal Justice 42 (1976). As a consequence, the purportedly neutral ban upon advertising becomes in effect a form of content regulation which discriminates against messages directed toward persons of moderate or low income. See Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 36-37 (1975).

The problem of discriminatory impact of Disciplinary Rule 2-101(B) is made more acute by a fact pointed out by Justice Holohan in his dissent below: attorneys are permitted certain kinds of advertising in "reputable law lists". Disciplinary Rule 2-102(A)(6) (App. 5a, infra.) permits the listing of scholastic honors, legal authorships,

and, with their consent, clients regularly represented. A law list is conclusively established as reputable if it is certified by the American Bar Association, a service for which the publisher pays a fee. (Exh. 5, A. 23, 406-07). These law lists are not, however, easily available to the general public. While some may be in public libraries, the bulk are distributed to lawyers and to institutional recipients in the commercial world. (Exh. 5, A. 23, 406). In this respect as well, the State Bar's regulation of advertising is particularly restrictive of the flow of information to the large noncommercial public which is most in need of it. See. D. Rosenthal, Lawyer and Client: Who's in Charge? 138-39 (Russell Sage Found. 1974).The prohibition of appellants' advertising of fee information in newspapers of general circulation is accordingly part of a system which discriminates against certain kinds of messages in violation of the First Amendment. Cf. Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

3. Appellants' right to advertise is supported by the constitutional right of consumers to legal services.

Consumers have their own First Amendment right to receive information. Virginia State Board of Pharmacy, supra; Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). But there is a more particular interest which militates heavily in favor of affording First Amendment protection to attorney advertising. Advertising is an essential element in extending legal services to those who are now unserved. The organized Bar recognizes as much in its programs of institutional advertising,[6]

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[6]The Maricopa County Bar Association reports in regard to its Lawyer Referral Service: "[A]n aggressive advertising campaign will be launched to inform and educate the public with regard to the availability of legal help at a reasonable cost. In the June issue of the ABA Journal, two cities of the same size were compared in effectiveness of their referral services. Hackensack, which did not advertise, made 692 referrals in 1974; Columbus, which did advertise made 7,830 referrals, more than 10 times

as does Disciplinary Rule 2-101(B) in permitting advertising by qualified legal assistance organizations. The services which appellants are advertising are ones to which consumers have an independent right under the First and other Amendments. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967). Appellants are therefore entitled to protection in their advertising because their "...First Amendment interests [coincide] with the constitutional interests of the general public". Bigelow v. Virginia, 421 U.S. at 822. Appellants' interests coincide as well with the command of Canon 2 of the Code

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that of Hackensack. What happens in Phoenix remains to be seen, but we are optimistic." Maricopa County Bar Ass'n Newsletter, Oct. 1976, p. 1. The Lawyer Referral Service advertises a $10 fee for initial consultation, but does not advertise what fees will be charged for specific services, nor which lawyer will perform them.

of Professional Responsibility, which requires the lawyer to assist the profession in making legal counsel available.

Appellants' motives in placing the advertisement were concededly economic as well as altruistic. But even if their motives were purely economic, that would not disqualify them from First Amendment protection. Virginia State Board of Pharmacy, 96 S. Ct at 1826. In the present case, however, the economic motives are inseparable from the public purposes. The public need for legal services at low cost is great, and efficient organization of high-volume practices is a promising path toward their provision. Q. Johnstone & D. Hopson, Jr., Lawyers and Their Work 543-45 (1967); N.Y. Bar Found., A Lawyer at a Price People Can Afford (1975); Comment, Bar Restrictions on Dissemination of Information about Legal Services, 22 U.C.L.A. L. Rev. 483, 497-501 (1974). Advertising is a primary means of producing that volume, and of permitting the economies of scale which make the provision of low-cost services modestly profitable. (A. 122-25). See FTC

v. Proctor & Gamble Co., 386 U.S. 568, 603 (Harlan, J. concurring). And the harsh fact is that if the widespread provision of legal services at low cost to persons of moderate means is not allowed to become modestly profitable, it will not be done at all.

B. No important state interest justifies the suppression of appellants' advertisement.

The usual burden of justification placed upon the state when its otherwise legitimate regulations impinge upon First Amendment expression is that the constraint must be necessary to the furtherance of a compelling state interest. See NAACP v. Button, 371 U.S. 415, 438-39 (1963); Dunn v. Blumstein, 405 U.S. 331, 342-43 (1972). In addition, the state must show that the restriction of speech is drawn as narrowly as possible and that no less restrictive means of regulation will suffice. Shelton v. Tucker, 364 U.S. 479, 488-90 (1960); Talley v. California, 363 U.S. 60, 62-64 (1960). In view of the public importance of the economic information conveyed by

attorney advertising, the same standard of review is appropriate here, at least as to advertising which is not false or deceptive. But even if some lesser standard of review is applicable to commercial speech, it is clear from Bigelow v. Virginia and Virginia State Board of Pharmacy, supra, that it is incumbent upon the state to demonstrate a very important interest which clearly outweighs the opposing interest in free speech. This the state has wholly failed to do.

It was argued below that appellants' advertisement constituted barratry. But a general prejudice against fostering litigation, however longstanding, is simply not sufficient justification for perpetuating the inability of millions of members of the public to know how to find a lawyer. The fact that many people do without legal services because the profession does not sufficiently reach out to them is regarded in most circles as an embarrassment to the Bar, not a reason for pride. See B. Christensen, Lawyers for People of Moderate Means 128-172 (Am. Bar Found. 1970). The

constitutional right of the individual to obtain legal services has on several occasions been held by this Court to outweigh traditional proscriptions upon barratry, or running and capping. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967). Nor is it at all clear why appellants' advertisement should constitute forbidden barratry when advertising by qualified legal assistance organizations or by County Bar Lawyers Referral Services are not. See Disciplinary Rule 2-101(B); footnote 6, supra. The publishing of information which enables a person who needs a divorce or relief in bankruptcy to obtain it simply cannot be counted a social evil. The bringing of wholly groundless suits is an entirely different matter, and is properly punishable. Disciplinary Rules 2-109; 7-102. There is no suggestion in the record that appellants have been guilty of that practice, nor that their advertisement encourages it.

The intimations in the record that the quality of services might decline if advertising were permitted (Exh. 5, A. 23, 376-78) do not withstand scrutiny. The proposition that an attorney who has advertised a fixed fee will cut quality when he runs up against an unexpectedly complicated case is utterly refuted by examples of high quality work done by attorneys when no fee or a low fee is involved. (Exh. 5, A. 23, 404-05). And it is wholly undercut by the fixed-fee schedule of the State Bar's own prepaid legal services program. (Exh. 12, A. 168, 459). If some attorneys are inclined to cut quality in order to protect or increase their profits, they can and will do that whether or not they advertise and whether or not they quote a fixed fee in advance. See Virginia State Board of Pharmacy, 96 S. Ct. at 1829. There are less drastic means of handling the problem of inadequate quality than by banning all public advertising. See Disciplinary Rule 6-101.[7] Most important,

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[7]The Supreme Court of Arizona, in adopting the Code of Professional Responsibility, omitted DR 6-101(A)(1) which

the entire question of quality has nothing to do with this case. There is not a hint in the record that appellants' services were not of good quality. On the contrary, the systematization of their practice tends to eliminate all-too-common errors such as omitting, in divorce settlements, consideration of life insurance for the parent liable for child support. (A. 118). Far from being narrowly tailored to the objective of insuring quality, the ban against public advertising is wholly irrelevant to that objective.

Another justification offered for the prohibition of advertising by attorneys is that it "can be inherently misleading". (Exh. 5, A. 23, 376; see also Exh. 3, A. 22, 291-92; Opinion

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prohibits an attorney from handling a matter he knows he is not competent to handle, without associating one who is competent. That provision is nevertheless available as an alternative to prohibiting advertising. The Supreme Court of Arizona did adopt DR 6-101(A)(2) and (3), prohibiting a lawyer from handling a matter without adequate preparation and from neglecting a matter entrusted to him. Ariz. Sup. Ct. Rule 29(a).

below, Juris. St. App. 7a, 8a, 12a). There is no empirical support, however for such an assumption. It is true that attorneys' services are more varied than those of pharmacists, but that does not render attorneys' advertising innately deceptive. Some services, such as those advertised by appellants, are relatively standardized and attorneys commonly set a fixed fee for them. Others are sufficiently unpredictable that most lawyers simply advise clients that a stated hourly rate will be charged. There is no reason why those fixed fees or hourly rates and the services to which they pertain become misleading when they are advertised instead of being quoted to the client in person or over the telephone (A. 238-40), so long as the advertised arrangements are adhered to.

There is, moreover, no explanation why the advertisement of lawyers' services to the general public is assumed to be misleading while advertising of those same services to beneficiaries of a closed-panel prepaid legal services plan, permitted by DR 2-101(B) and DR 2-103(D),

apparently is not. Furthermore, it is inconsistent with the First Amendment to ban all advertising simply because some of it might be misleading. Hiett v. United States, 415 F. 2d 664, 671 (5th Cir. 1969), cert. denied, 397 U.S. 936 (1970). The narrower alternative of prohibiting advertising that is false or misleading is available. Virginia State Board of Pharmacy, 96 S. Ct. at 1830, n. 24; 96 S. Ct. at 1833-35 (Stewart, J., concurring). Indeed, that alternative has been exercised. Disciplinary Rule 1-102(A)(4) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." False or deceptive advertising is forbidden by state and federal statutes. E.g. Ariz. Rev. Stat. §§ 44-1481, 44-1522; 15 U.S.C. 45. A total ban is accordingly unjustified.

Appellants' advertising itself is not deceptive or misleading. There is nothing in the record to suggest that appellants deviate from the advertised fees, or that they do not render the advertised services competently. The advertisement did ask the reader whether

he needed a lawyer. Bar Counsel argued below that this is misleading because one can obtain a name change without a lawyer, even though the proceeding is a judicial one governed by statutory standards.[8] Ariz. Rev. Stat. §§ 12-601, 12-602. This hardly constitutes deception. A litigant is virtually always entitled to conduct his own case, but it is wholly unreasonable to conclude from that fact that he does not "need" a lawyer. The only meaning that can sensibly be ascribed to the term "need" in the context of the advertisement is that a person needs a lawyer when he feels the need of a lawyer's assistance in doing that which lawyers usually do.[9] In any

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[8]When a name change problem can be settled by administrative action, appellants send the client on his way with instructions how to effectuate the change himself. When the client seeks appellants' services for a name change which requires a judicial proceeding, however, appellants do not feel under a duty to raise the suggestion that the client do it himself. (A. 111-113)

[9]The Maricopa County Bar Association apparently places this sensible construction on the term. One of its brochures

event, appellants were not charged with deceptive advertising, merely with advertising, and the Court below made no determination that appellants' advertisement was deceptive in any particular.[10]

All of the justifications discussed above suffer from the fatal defect highlighted in Virginia State Board of Pharmacy, 96 S. Ct. at 1829: they rest on the notion of protecting the public by keeping it in ignorance. Thus barratry is to be avoided by suppressing information aimed at those who do not know of their rights or legal needs. Quality is to be upheld by keeping the public from learning in advance the fees lawyers charge. Deception by some attorneys

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for public distribution contains on its front page in large letters in English and Spanish: "Do You Need A Lawyer?", along with the name and telephone number of the Lawyer Referral Service.

[10]Justice Gordon in his concurring opinion below suggested that it might be deceptive to advertise legal services in connection with an uncontested adoption when a statute requires the county attorney to perform similar services upon

is to be avoided by prohibiting them all from public advertising. This is not the way of the First Amendment.

The remaining justifications offered or implied to support the ban upon advertising are even less substantial. A desire to uphold the dignity of the profession (Exh. 3, A. 22, 287-88) is not primarily a public concern. There has been no demonstration that the dignity of lawyers is inextricably tied to the public's respect for the law. Nor is there any factual support for the conjecture that advertising inevitably leads to loss of dignity;

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application. This statement embodies a serious misunderstanding which must be corrected.

The services which the county attorney performs under Ariz. Rev. Stat. § 8-127 are to obtain a consented adoption. Consent is required from both natural parents with certain exceptions, one of which is that consent is not necessary from a parent whose parental rights have been terminated. Ariz. Rev. Stat. § 8-106. That termination, commonly called a "severance" proceeding, conducted under Ariz. Rev. Stat. §§ 8-531 through 8-544, is the service advertised by appellants. It is not performed free upon application by the county attorney.

it is questionable that stockbrokers or bankers are considered undignified because they or their institutions advertise. Limited exceptions to the ban on advertising suggest that the Bar does not consider advertising invariably undignified. See Disciplinary Rule 2-101.

A final, possible reason for the prohibition of advertising is to prevent competition, unseemly or otherwise. There is a suggestion in the record, for example, that if advertising were permitted large firms would employ their greater resources in advertising to the detriment of smaller, less established firms. (Exh. 3, A. 22, 293-94). This argument overlooks the substantial advantage now enjoyed by established firms under an enforced absence of advertising. D. Rosenthal, Lawyer and Client: Who's in Charge? 138 (1974). More important, the argument is impermissible in terms of freedom of commercial expression.

> [T]the concept that government may restrict the speech of some elements of our society in order to enhance the

> relative voice of others is wholly foreign to the First Amendment....

Buckley v. Valeo, 96 S. Ct. 612, 649 (1976).

There are several indications in the record from State Bar witnesses that aspiring members of the professions are able to succeed economically without advertising (Exh. 3, A. 22, 294-95; Exh. 4, A. 23, 318-19). Indeed, increased economic success is to be expected among suppliers of services when price competition is restricted by prohibiting advertising or by other means. That does not infuse the prohibition with a public interest. There is consequently no important state interest supporting the ban of Disciplinary Rule 2-101(B), and the Court below erred in failing to strike it down.

C. Disciplinary Rule 2-101(B) is fatally overbroad in its ban upon public advertising by individual attorneys.

A regulation directed toward speech or press which prohibits expression protected by the First Amendment is void,

and cannot be applied even to a person whose activity is not constitutionally privileged. Coates v. Cincinnati, 402 U.S. 611 (1972). The ban of Disciplinary Rule 2-101(B) prohibits much expression protected by the First Amendment; its overbreadth is substantial. See Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973). First, it prohibits all individual lawyers' advertising of fees and services, no matter how accurate and useful. In addition, it endangers attorneys who wish to place advertisements discussing such issues as the merits of legal clinics or the desirability of lawyer advertising, if those attorneys identify themselves as such in the publication. Yet the fact that they are practicing attorneys is of importance to the public in evaluating the significance of the message.

It is recognized that this type of wholesale overbreadth was sanctioned in Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935), relied upon by appellee and the Court below. But the prohibition against professional advertising in Semler was

attacked on substantive due process and equal protection grounds; no First Amendment claim was involved. When a First Amendment challenge is made, it is clear that an overbreadth attack is proper against a regulation of commercial speech. Bigelow v. Virginia, 421 U.S. 809 (1975).

Appellants do not contend, nor could they, that attorney advertisements are entitled to the same breadth of protection given political speech. This Court has indicated that problems of confusion and deception might arise if the professions undertook "certain kinds" of advertising. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. at 1831, n. 25. Certainly false and misleading advertising may be prohibited for attorneys as for others. In some cases time, place and manner restrictions may be imposed to prevent handbilling to persons under unusual physical or mental stress, as at the scene of accidents or in hospital emergency rooms. But the important goal is that the presumption be placed where the First Amendment

places it -- in favor of speech. Misleading advertising, for instance, is often best handled by a requirement of additional disclosure, so that more information is furnished to the public for purposes of individual and societal choice. See Virginia State Board of Pharmacy, 96 S. Ct. at 1829. Disciplinary Rule 2-101(B) and the decision below follow the contrary path of shutting off the flow of information, and for that reason they cannot stand consistently with the First Amendment.

II. ENFORCEMENT OF DISCIPLINARY RULE 2-101(B) AGAINST APPELLANTS VIOLATES THE SHERMAN ACT

A. The Sherman Act is applicable to the State Bar and to a restraint upon the advertisement of fees.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court held that minimum fee schedules established and enforced by bar associations violated the Sherman Act. In rejecting the traditional claim of the learned professions

to an exemption from the antitrust laws, this Court noted that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act...." Id. at 787. That expansive intent and the terms of the statute itself support the application of the Sherman Act to the ban upon lawyers' advertising in this case.

Section 1 of the Sherman Act prohibits contracts or conspiracies in restraint of trade, and Section 2 prohibits monopolizing or attempting to monopolize. 15 U.S.C. §§ 1, 2. It is clear in the present case that members and officials of the State Bar of Arizona, taking their lead from the American Bar Association (Exh. 5, A. 23, 351-53), have cooperated in restricting advertising, including the advertisement of fees, and that this restriction is enforced as part of the system of regulation attending the Bar's monopoly over the practice of law in the state.

A combination or agreement which has as one of its goals the suppression of direct advertising of prices is per se violative of the Sherman Act. United States v. Gasoline Retailers Ass'n,

Inc., 285 F.2d 688 (7th Cir. 1961). See Louisiana Petroleum Retail Dealers v. Texas Co., 148 F.Supp. 334 (W. D. La. 1956). Status as a profession does not authorize substitution of a "rule of reason" for a per se rule. United States v. National Society of Professional Engineers, 404 F. Supp. 457 (D. D.C. 1975); Cf. American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943). In any event, the severe anticompetitive effect of a prohibition of price advertising is established in the record. (A. 173-188; Exhs. 13, 14). To the extent, then, that the decision below may purport to rest upon a qualitative distinction in competitive effect between minimum fees and a restraint upon fee advertising, it is erroneous.[11]

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[11]The Federal Trade Commission has proposed regulations which would prohibit any state restrictions on the disclosure of accurate price information in the funeral industry, 40 Fed. Reg. 39901 (1975) and which would permit advertising of the price and availability of prescription eyeglasses, 41 Fed. Reg 2399 (1976). See also California Citizens Action Group v. Dept. of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal.

The restraint upon advertising substantially affects interstate commerce, both in the practice of members of the State Bar who benefit competitively from the restriction (Exh. 5, pp. 10-11), and in appellants' own practice (Tr. 154-158; Exh. 16). Appellant's advertisement itself was distributed in interstate commerce. (A. 587). These effects upon commerce meet the standards set by Goldfarb v. Virginia State Bar, supra, for application of the Sherman Act.

As the Court below recognized, it is a valid defense in a non-antitrust proceeding that the order sought would enforce a violation of the antitrust laws, Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 261 (1909); Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942),

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1976), vacated and remanded for further consideration in light of Virginia State Board of Pharmacy, supra, 96 S. Ct. 2619 (1976).

The FTC has also commenced action against the American Medical Association for its restrictions upon advertising, 3 CCH Trade Reg. Rep. 21,068 (1975), as has the Justice Department against the American Bar Association, (Civ. No. 76-1182, D.D.C. 1976).

and that defense is available in state court, General Aniline & Film Corp. v. Bayer Co., 305 N.Y. 479, 484-84, 113 N.E. 2d 844, 847 (1953). The Court below refused, however to uphold the antitrust defense, and its primary reason was that the Sherman Act was inapplicable under the state action exemption doctrine of Parker v. Brown, 317 U.S. 341 (1943). It is accordingly upon that point that the application of the antitrust laws in the present case turns.

B. The ban upon fee advertising is not exempt from the Sherman Act by reason of the "state action" doctrine of Parker v. Brown, as elaborated in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976).

Parker v. Brown held that an anti-competitive raisin marketing program operated by the "legislative command of the state" was not within the scope of the Sherman Act. 317 U.S. 341, 150 (1943). This Court was careful to note, however:

> True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, Northern Securities Co. v. United States, 193 U.S. 197; and we have no questions of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade....

Id. at 351-52. See also, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970); Woods Exploration & Prod. Co. v. Aluminum Corp. of America, 438 F.2d 1286 (5th Cir. 1971).

Last term, this Court defined the Parker "exemption" in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976). There it was held that a regulated power company's practice of supplying free light bulbs violated the Sherman Act even though the policy had been approved by the state utility commission and the utility was not free under state law to deviate from it. In rejecting the utility's Parker defense, this Court ruled: (1) that a privately initiated

restraint is not withdrawn from the Sherman Act by its embodiment in a state command; and (2) that pervasive state regulation of an industry did not give rise to a Parker v. Brown exemption where the exemption in question was not necessary to make the regulatory scheme work. It further stated (3) that even in cases of direct conflict, it is not necessarily true that the federal interest must inevitably be subordinated to that of the state. All of these elements of the Cantor decision are repeated in the present case, and require reversal of the decision below.

1. Disciplinary Rule 2-101(B) is the result of private initiative and is subject to the federal antitrust laws.

The ban upon advertising by attorneys originated with the private American Bar Association in 1908 as Canon 27 of the ABA Canons of Professional Ethics.[12]

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[12]The first code of ethics in the Unites States, that of the Alabama State Bar Association in 1887, provided that "Newspaper advertisements, circulars and business cards, tending professional services to the general public, are proper...." H. Drinker, Legal Ethics 356 (1953).

H. Drinker, Legal Ethics 23-25, 215 (1953). The Arizona Supreme Court adopted that Canon, along with the other ABA canons, into its rules in 1954.[13]

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[13]The ABA Canons of Ethics were also incorporated by reference into Arizona statutes in 1919. Ariz. Sess. Laws 1919, c. 158. A vestige of this adoption remains today as Ariz. Rev. Stat. § 32-267(8), which authorizes the Supreme Court of Arizona to suspend or disbar attorneys "[f]or any other unprofessional or unethical conduct violative of the canons and ethics of an attorney at law as adopted by the American bar association." That statute was not relied upon by the Court below, nor was it referred to in the charge against appellants. (A. 6). The Supreme Court of Arizona has strongly stated that it has inherent power to impose restrictions on the practice of law or to define unauthorized practice of law. In re Greer, 52 Ariz. 385, 389-90, 81 P.2d 96, 98 (1938); State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961). In its opinion below, the Court stated that the legislative branch may not interfere with the Court in its constitutional regulation of the practice of law. (Juris. St. App. p.

Ariz. Code, 1939 (1954 Supp. p. 211; Rule 1(B)). The American Bar Association subsequently revised its Canons into the Code of Professional Responsibility to be effective in 1970. The State Bar of Arizona participated in this process. The prohibition of advertising appears as Disciplinary Rule 2-101(B) of that Code. It was adopted, along with nearly all of the rest of the ABA Code, by the Supreme Court of Arizona in 1970. Ariz. Sup. Ct. Rule 29(a). A 1974 amendment of DR 2-101(B) by the American Bar Association to accommodate institutional advertising by legal assistance organizations was adopted by the Supreme Court of Arizona in 1975 with minor modifications in language.[14]

The structure of the integrated State Bar of Arizona is established

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5a). The jurisdictional power of the Court below in applying its rule to appellants consequently does not depend on the state statute, and would be unaffected by its repeal. It is accordingly the Court's rule, and not the statute, which is at issue in this case.

[14]See note 2, supra p. 13.

by statute, Ariz. Rev. Stat. §§ 32-201-242, but it is autonomous and self-governing in operation. It is represented in the American Bar Association. (Exh. 5, A. 23, 353-54). Its role in enforcing the Code of Professional Responsibility is illustrated by this case, in which it prepared the charge, maintained the prosecution of it, and conducted hearings resulting in recommendations to the Arizona Supreme Court. In addition, its Committee on Rules of Professional Conduct issues ethics opinions which aid in the administration of the Code of Professional Responsibility. In short, the activities of the State Bar of Arizona virtually parallel those of the Virginia State Bar, of which this Court said:

> The fact that the State Bar is a state agency for some purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975).

Since a private agreement by the American Bar Association and the State Bar of Arizona to prohibit price advertising is subject to the federal antitrust laws, no immunity is gained by their success in having the prohibition written into the command of the Arizona Supreme Court. Cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). Antitrust immunity is not even conferred when the state command is essential to the functioning of the restraint. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 389 (1951); Cantor v. Detroit Edison Co., 96 S. Ct. at 3118 and n. 30.

As indicated in Cantor, it is not unfair to hold private parties responsible under the antitrust laws when, as here, they have exercised a considerable degree of freedom of choice in initiating the restraint. 96 S. Ct. at 3118-19. There is clearly no unfairness in the present case, where appellants are simply seeking to invalidate the restraint, not to impose treble-damage liability upon the State Bar or the

American Bar Association.[15] See Cantor, 96 S. Ct. at 3128, n. 6 (Blackmun, J., concurring).

Since the Bar's prohibition of advertising is invalid under Cantor even though it has been embodied in an Arizona Supreme Court rule, it is obviously appropriate to permit a Sherman Act defense to enforcement of that rule. For example, it is clear after the decision in Cantor that the Michigan Public Service Commission is precluded from enforcement of the tariff provisions regarding the distribution of free light bulbs by Detroit Edison Co. Viewed from another perspective, the appellants in

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[15] The State Bar is not aided by Eastern Ry. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 217 (1961). There plaintiffs sought to impose Sherman Act liability for the actions of railroads in conducting a publicity campaign to defeat legislative action. The case is inapplicable where private parties act in violation of the Sherman Act, as the State Bar and American Bar Association do in agreeing not to advertise or permit advertisement, even though that action may have been approved by the state. Cantor, 96 S. Ct. at 3122.

the present case simply seek to be excused from forced participation in concerted action of the bar associations which violates the Sherman Act. The decision in Cantor entitles them to that relief.

2. The federal antitrust laws prevail over the state rule suppressing advertising because that rule is not necessary to the state's regulation of the practice of law.

Cantor applied the Sherman Act to a public utility, a segment of industry that is probably more pervasively regulated by the states than any other. In rejecting a Parker v. Brown exemption, this Court held that a regulation which conflicts with the federal antitrust laws is invalid unless it is necessary to make the state regulatory scheme work. 96 S. Ct. at 3120. The ruling parallels the approach that has prevailed in determining whether federal regulatory statutes have constituted an implied repeal of the antitrust laws. For example, in Silver v.

New York Stock Exchange, 373 U.S. 341 (1963), this Court held that the authority of self-regulation granted the stock exchange in the Securities Exchange Act of 1934 did not exempt the exchange and its members from liability for a group boycott under the Sherman Act. The Court stated:

> ...[T]he proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.

373 U.S. at 357. Any repeal of the antitrust laws was to be implied "only to the minimum extent necessary" to make the regulatory program work. Id. See also Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). There is nothing in the record to support a contention that the ban upon general advertising by attorneys is essential to Arizona's overall regulation of the practice of law. In this area perhaps more than in others, it is essential "not to confuse the familiar with the necessary". See Griffin v. Illinois, 351 U.S.

12, 20 (1956) (Frankfurter, J. concurring). Advertising will not affect the state's control over the admission of attorneys to practice, their conduct in practice under the great majority of disciplinary rules, and the imposition of sanctions against them for violation of those rules. A total ban upon advertising is not necessary to protect the public from deception or incompetence. See pp. 43-46, supra. The fact that regulation of the practice of law is consistent with advertising is indicated by the institutional advertising now permitted, DR 2-101(B), by law list advertising, DR 2-102(A)(6), and by initiatives under way in some states to permit certain types of individual advertising. E.g., N.Y State Bar Ethics Op. 441, Aug. 11, 1976; State Bar of Calif. Program in Lawyer Advertising, Bd. of Governors Recommendation, Aug. 26, 1976. The prohibition of appellants' fee advertising is consequently not necessary to make the state regulatory scheme work, and for that reason it is not exempt from the federal antitrust laws.

3. The federal interest in enforcing the Sherman Act outweighs the state's interest in its rule suppressing advertising.

Even if the ban upon advertising were central to the state's regulation of the practice of law, which appellants do not concede, it does not inevitably follow that it is immune from the Sherman Act. Cantor, 96 S. Ct.at. 3119. In determining whether the federal antitrust laws prohibit conduct commanded by a state regulatory authority, some comparative weighing of the conflicting interests seems inevitable. As this Court has said:

> The Sherman Act was designed to be a charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the

> same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific R. Co. v. United States, 356 U.S. 1, 4 (1958). That strong national policy ought not to be automatically frustrated by the simple election of a state to dictate the operation of an industry along noncompetitive lines contrary to the free enterprise model protected by the federal statute. See Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L. Rev. 693 (1974). Even when the state regulation in issue is necessary to the operation of the regulatory scheme, Parker v. Brown does not compel an exemption. In Parker the state noncompetitive marketing system paralleled a federal system of noncompetitive marketing established by a statute which recognized the possibility of concurrent and complementary state schemes. See H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537 (1949). There is no comparable federal exception

to the Sherman Act for the delivery of legal services. On the contrary, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) testifies to a national policy of price competition in that sector.

When Congress establishes a regulatory system containing essential noncompetitive elements, an exception to the antitrust laws is implied. Gordon v. New York Stock Exchange, 422 U.S. 659 (1975). It does not follow from that fact, however, that a comparable establishment of a regulatory system by a state inevitably confers the same immunity. Congress, after all, is entitled to repeal the Sherman Act and the states are not. As the Court of Appeals stated in Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972):

> ...[W]e suggest that it may be inaccurate and confusing to speak of "valid governmental action which is immune from application of the antitrust laws." Rather, the proper inquiry would seem to be to what extent Congress

> has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws, or, where state action is concerned (since states are not named in the Sherman Act and antitrust laws are directed at suppression of anticompetitive business action), the inquiry should be to what extent is the state action permissible as not contravening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power.

In determining what state action is "permissible" within the intended scope of the antitrust laws, it is appropriate to assess the relative importance of the state interest being asserted. Cantor, 96 S. Ct. at 3126 (Blackmun, J., concurring). But the state must be subject to the Sherman Act unless it can show that its interest in the regulation in question outweighs the national interest in competition. No such showing has been made here.

The primacy of the public interest in advertisement of the cost and availability of legal services, and the absence

of state interest in the suppression of it, have been fully set forth in Part I of this argument, pp. 30-51, supra, and will not be restated here. Viewing the conflicting interests from an antitrust standpoint only buttresses the conclusion that an efficient allocation of resources, the provision of services of good quality at the lowest cost, and the stimulation of innovation are all best served by permitting competitive advertising. See Rept., Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising, Monopolies and Mergers Commission (1976) (App. 6a-9a, infra).

A state action exemption is particularly unjustified where, as here, the state scheme of regulation has anticompetitive effects without substituting any compensating state regulation. For example, in regulating public utilities the state may justifiably confer a monopoly when it regulates rates to prevent the excesses which might otherwise attend monopoly power. But in its suppression of price advertising, Disciplinary Rule 2-101(B) is anticompetitive and tends to increase fees

(A. 187-88; 193) in a way which is not corrected by any state system of fee regulation. It is true that Disciplinary Rule 2-106(A) prohibits the charging of a "clearly excessive fee", but the ethics committees of the American Bar Association and the State Bar of Arizona have stated that the amount of a fee presents no ethical question unless it is so excessive as to amount to a misappropriation of the client's funds. ABA Comm. on Prof. Ethics Op. 27 (1930), Op. 320 (1968); State Bar of Ariz. Comm. on Rules of Prof. Conduct Op. No. 179 (1965). The state regulatory scheme consequently leaves the setting of fees entirely to the private initiative of those who benefit from the prevention of competition inherent in the prohibition of fee advertising. Under these circumstances, there is no reason for shielding the prohibition from the reach of the Sherman Act. Cf. Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971).

C. The state court's regulation of the practice of law is not immune from the federal antitrust laws under the doctrine of separation of powers.

The principal opinion in the Court below suggested that neither the federal nor the state legislature could interfere with the Court's regulation of the practice of law. (Juris. St. App. 5a). This contention appears to be based upon the doctrine of separation of powers, but that concept is not generally applicable between the state and federal levels of government. Cf. Baker v. Carr, 369 U.S. 186 (1962). Nor is the practice of law inherently free from legislative regulation; state legislatures may regulate wherever the state constitution permits it. In re Cooper, 22 N.Y. 67, 90-91 (1860); J. Fisher and D. Lackman, Unauthorized Practice Handbook (Am. Bar. Found. 1972). State courts are entitled to no greater freedom from the federal legislature than from state legislatures. The supremacy clause itself refutes the proposition. U.S. Const., Art. VI, § 2. Cf. Testa v. Katt, 330 U.S. 386 (1947).

Nor does any principle of federalism decree that state court regulation of attorneys withdraws them from the otherwise proper reach of the federal commerce power. Attorneys may be "officers of the courts", but they are not employees of the courts.

> ...[A] lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term.

Cammer v. United States, 350 U.S. 399,405 (1956). An application of the antitrust laws to the independent practices of lawyers does not, therefore, constitute an attempt at federal regulation of the state court as such. It merely applies a federal law to a form of interstate commerce in a manner which preempts a conflicting state command.

Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Arizona should be reversed.

Respectfully submitted,

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APPENDIX

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U.S. Const., Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sherman Act, 15 U.S.C. §§ 1 and 2:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied in intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under

section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minumum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Ariz. Rev. Stat. § 32-267. Grounds for disbarment.

An attorney licensed to practice law in this state may have his license revoked or suspended by the supreme court for any of the following reasons:
* * * *

8. For any other unprofessional or unethical conduct violative of the canons and ethics of the profession of an attorney at law as adopted by the American Bar Association.

Ariz. Rev. Stat. § 44-1481. Fraudulent advertising practices defined; violation; penalty.

A. A person is quilty of a misdemeanor who:

1. Knowingly and with the intent to sell to the public real or personal property or services, or to induce the public to acquire an interest therein, makes and publishes an advertisement, either printed or by public outcry or proclamation, or otherwise, containing any false, fraudulent, deceptive or misleading representations in respect to such property or services, or the manner of its sale or distribution.

2. Publishes circulates or disseminates any statement or assertion of fact concerning real estate which is known by him to be untrue, and which is made or disseminated with the intention of misleading.

B. A merchant is quilty of a misdemeanor who advertises or displays any brand of goods known to the general public and quotes prices in connection therewith as an inducement to attract purchasers to the place of business so advertised, and makes false statements regarding the quality or merits of the goods advertised.

C. A person or merchant who violates the provisions of this section shall be punished as follows:

1. For the first offense, by a fine of

not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail for not less than thirty nor more than ninety days.

2. For the second offense, by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than sixty days nor more than six months.

3. For the third offense, by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail for not less than ninety days nor more than one year.

Ariz. Rev. Stat § 44-1522. Unlawful practices; intended interpretation of provisions.

A. The act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

B. It is the intent of the legislature that, in construning the provisions of subsection A of this section, that the courts may use as a guide interpretations given by the federal trade commission and the federal courts to §§ 45, 52 and 55(a)(1) Title 15, U.S.C.A. of the federal trade commission act. Added Laws 1967, Ch. 43, § 1.

Ariz. Supreme Court Rule 29(a), 17 Ariz. Rev. Stat. (Supp. 1976):

DR 1-102. Misconduct

(A) A lawyer shall not:
* * * *
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

DR 2-102. Professional Notices, Letterheads, Offices, and Law Lists

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:
* * * *
(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that

the lawyer or law firm specializes in a particular field or law or law practice but only if authorized under DR 2-105(A) (4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies, foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

* * * *

DR 6-101. Failing to Act Competently

(A) A lawyer shall not:
    (1) (DR 6-101(A)(1) was omitted by the Arizona Supreme Court in its Order adopting the Code of Professional Responsibility.)
    (2) Handle a legal matter without preparation adequate in the circumstances.
    (3) Neglect a legal matter entrusted to him.

Monopolies and Mergers Commission, SERVICES OF SOLICITORS IN ENGLAND AND WALES, A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising (Her Majesty's Stationery Office, 1976):

* * * *

Chapter 5. Conclusions.

* * * *

Efficiency and the competitive situation.

* * * *

121. We know of no method of making a quantitative comparison between the present state of efficiency of solicitors' practices and their hypothetical state of efficiency if advertising were permitted. There is at least no obvious reason for supposing the freedom to advertise would lead, on average, to a lower degree of efficiency than exists at present. The Council argued that freedom to advertise would simply lead to increase in overhead costs, and that even if advertising led to increased business there would be little or no corresponding economies of scale. We do not dispute that some advertising cost might be incurred simply to neutralise the advertising initiated by other solicitors, thereby raising total costs without causing any reallocation of business. But not all advertising would be of this kind. Moreover, we think it likely that some practices are more efficient than others (either generally or in some branches of activity), so that reallocation of some work could improve the efficiency with which the work as a whole was carried out. Finally, it seems to us likely that solicitors in general would see no advantage in advertising on a lavish scale, though on occasions some firms might wish to spend relatively heavily in an attempt to expand their business (for example in order to secure such economies of larger scale as might be available to them in the employment of more specialised staff).

122. As regards innovation, we accept that the profession has not stood still and that new methods and modern office techniques have been adopted. But the decision whether or not to introduce innovatory methods or services into an individual practice, particularly if the introduction would involve capital expenditure or expansion of staff, can depend upon the amount of additional business that could be handled as a result of new methods and that could be expected as the result of new services. Not all practitioners will wish to take the risk; and at present some of the more enterprising who might wish to do so might be deterred by the consideration that they would be unable to make proper use of these methods or services through their inability to increase their business by advertising.

123. As to the establishment of new practices (whether partnerships or individual practitioners), we think that the restrictions on advertising must indeed impede new practices in their efforts to establish themselves. This we regard as undesirable since to the extent that they discourage the setting up of new practices potential competition is reduced, and the incentive to efficiency and a high standard of service to the public is diminished.

124. It is our view that it is a significant disadvantage of the existing restrictions on advertising of solicitors' services that they have an adverse effect on the competitiveness and efficiency of the profession, on the introduction of innovatory methods and services and on the setting up of new practices.

125. There is another aspect of the matter related both to the supply of

information and to competition. Solicitors do not compete only with other solicitors. For certain types of business, for example advice on taxation matters, they compete with others including firms of accountants and banks. There are no restrictions on advertising by banks comparable to those on advertising by solicitors, and we have recommended in an earlier report that the restrictions on advertising by accountants should be relaxed. Similar relaxation in the case of solicitors should thus both provide the public with more information on how best to obtain help in such matters and also increase competition. These results we would regard as in the public interest.

* * * *

136. We consider that Rule 1 of the Solicitors' Practice Rules, which places a general prohibition on advertising and soliciting business, should be terminated and replaced by a rule which would permit any solicitor in England and Wales to use, whenever he thinks fit, such methods of publicity as he thinks fit, provide that:

(1) No advertisement, circular or other form of publicity used by a solicitor should claim for his practice superiority in any respect over any or all other solicitors' practices.

(2) Such publicity should not contain any inaccuracies or misleading statements.

(3) While advertisements, circulars and other publicity or methods of soliciting may make clear the intention of the solicitor to seek custom, they should

not be of a character that could reasonably be regarded as likely to bring the profession into disrepute.

* * * *